IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NATHANIEL ROBINSON, Plaintiff,	:	CIVIL ACTION
v.	:	NO. 97-CV-6497
RED ROSE COMMUNICATIONS, INC., DENVER AND EPHRATA TELEPHONE and TELEGRAPH COMPANY and AEROTEK, INC., Defendants.	:	

McGlynn, J. **May , 1998**

MEMORANDUM OF DECISION

Plaintiff, Nathaniel Robinson ("Mr. Robinson"), brings this action against Defendants Red Rose Communications, Inc. ("Red Rose"), Denver and Ephrata Telephone and Telegraph Company ("Denver & Ephrata") and Aerotek, Inc. ("Aerotek") (collectively "Defendants"), alleging discriminatory discharge based on race in violation of: (1) Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e; (2) the Pennsylvania Human Relations Act ("PHRA"), 43 Pa. Cons. Stat. Ann. § 955, et seq.; and (3) 42 U.S.C. § 1981. Mr. Robinson also seeks relief under the common law theory of promissory estoppel. Currently before the court are Plaintiff's Motion for Relief Pursuant to Rule 60(b) and Defendant Aerotek's Motion to Dismiss Counts I, II and IV. For the reasons set forth below, Plaintiff's motion will be denied and Defendant Aerotek's Motion will be granted.

I. BACKGROUND

Prior to April of 1997, Aerotek, a "headhunting" agency,

contacted Mr. Robinson about accepting a position in the telecommunications field. Compl. ¶ 7. In April of 1997, Aerotek placed Mr. Robinson, an African-American male, with Red Rose and Denver & Ephrata, a telecommunications business, as a Facilities Management Coordinator at their QVC site in West Chester, Pennsylvania. Id. ¶ 9. On April 30, 1997, Mr. Robinson alleges he signed an employment agreement with the Defendants. Id. ¶ 11. Mr. Robinson then reported for his first full day of work at QVC on Thursday, May 1, 1997. Id. ¶ 13. Upon arriving for work on Monday, May 5, 1997, Mr. Robinson was informed by one of his co-employees, Carl Witwer, that his services were terminated. Id. ¶ 14. After placing a telephone call to Defendants' offices, Mr. Robinson was told that he was terminated because he was "lazy, untrustworthy, and acted inappropriately." Id. ¶ 15.

On May 23, 1997, Mr. Robinson filed a charge of discrimination with the Equal Employment Commission ("EEOC") and cross-filed the charge of discrimination with the Pennsylvania Human Relations Commission ("PHRC"). Pl's Memo. in Opp'n to Df. Aerotek's Mot. to Dismiss, at 2. Defendants, however, claim Mr. Robinson did not file a complaint with the PHRC until October 29, 1997. Df. Aerotek's Mem. in Support of Its Mot. to Dismiss, at 3, Exh. C. During the summer of 1997, Mr. Robinson requested a notice of right to sue from the EEOC. Pl's Mem. in Opp'n to Df. Aerotek's Mot. to Dismiss, at 2. On September 30, 1997, the EEOC terminated its investigative efforts and issued Mr. Robinson a notice of right-to-sue. Aerotek's Mem. in Support of Its Mot. to Dismiss, at Exh. B.

The complaint in this action was filed on October 20, 1997. On January 15, 1998, the PHRC closed Mr. Robinson's case. Df. Aerotek's Response in Opp'n to Pl's Mot. For Relief Pursuant to Rule 60(b), at Exh. B. Because the cross-filing of discrimination charges with the EEOC and the PHRC obliged Mr. Robinson to exhaust his administrative remedies as prescribed by the PHRA, this court dismissed Count II of Mr. Robinson's Complaint on January 21, 1998. See Order, Jan. 21, 1998. The court reasoned that having invoked the PHRA, Mr. Robinson's remedy was limited to "an action in the Court of Common Pleas" pursuant to 43 P.S. § 962(c)(1). Id.

Mr. Robinson seeks reinstatement of Count II, claiming the PHRC's administrative closing of his case on January 15, 1998 exhausted Mr. Robinson's administrative remedies thereby rendering the court's January 21, 1998 order moot. On the other hand, Aerotek seeks dismissal of Count I, claiming Mr. Robinson filed suit in federal court prior to exhausting his EEOC administrative remedies. In addition, Aerotek seeks dismissal of Count IV, contending promissory estoppel is not a valid exception to the Pennsylvania at-will employment rule.

II. DISCUSSION

A. Count I: Title VII

Aerotek requests dismissal of Mr. Robinson's Title VII claim, contending this court is without jurisdiction to address Mr. Robinson's claim because the EEOC did not have the power to issue Mr. Robinson a notice of right-to-sue.

1. Standard of Review: Rule 12(b)(1)

A Rule 12(b)(1) motion questions the court's jurisdiction to hear a case. Robinson v. Dalton, 107 F.3d 1018, 1021 (3d Cir. 1997)(citing Mortensen v. First Fed. Sav. and Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977)). Under a Rule 12(b)(1) motion to dismiss, "no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." Mortensen, 549 F.2d at 891. As a result, a trial court "is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." Intern. Ass'n of Machinists & Aerospace Workers v. Northwest Airlines, Inc., 673 F.2d 700, 711 (3d Cir. 1982).

2. Early Right-To-Sue Notice

According to Aerotek, the EEOC regulation permitting the issuance of early right-to-sue letters is invalid.[1] Aerotek also claims that filing this action in federal court prior to the completion of the 180-day period is akin to failing to cooperate with the EEOC during its investigation. Df. Aerotek's Reply Memo. in Support of Its Mot. to Dismiss, at unnumbered 6. Mr. Robinson disagrees, arguing that the issuance of early right-to-sue letters is a proper exercise of the EEOC's regulatory authority. Pl's Mem. in Opp'n to Df. Aerotek's Mot. to Dismiss, at 4. Moreover, because more than 252 days have passed since the EEOC filing, Mr. Robinson argues the issue is moot. Id. at 5-6.

[1] The EEOC issued Mr. Robinson a "Notice of Right to Sue" letter 129 days after he filed the charge with the EEOC.

In section 1601.28(a)(2) of its procedural regulations, the EEOC authorized itself to issue early right-to-sue notices. 29 C.F.R. 1601.28(a)(2) (1998). According to the EEOC, this regulation is a valid exercise of its statutory power "to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this subchapter." 42 U.S.C. § 2000e-12(a). The effect of such early right-to-sue notices, however, is in a state of flux in this circuit. See, e.g., Pearce v. Barry Sable Diamonds, 912 F. Supp. 149 (E.D. Pa. 1996)(questioning validity of EEOC regulation, 29 C.F.R. § 1601.28(a)(2), permitting issuance of early right-to sue-letters); see also Moteles v. Univ. of Pennsylvania, 730 F.2d 913, 916-18 (3d Cir.)(expressing preference, in dicta, for exhaustion of administrative procedures), cert. denied, 469 U.S. 855 (1984). Compare Sims v. Trus Joist MacMillan, 22 F.3d 1059 (11th Cir. 1994)(finding EEOC's issuance of early right-to-sue letters permissible under section 2000e-5); Bryant v. California Brewers Ass'n, 585 F.2d 421, 425 (9th Cir. 1978)("Nowhere does the statute prohibit the EEOC from issuing such notice before the expiration of the 180-day period"), vacated and remanded on other grounds, 444 U.S. 598 (1980), with Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 361 (1977) (commenting that 180-day provision is not statute of limitation but instead, "simply provides that a complainant whose charge is not dismissed or promptly settled or litigated by the EEOC may himself bring a lawsuit, but that he must wait 180 days before doing so."); EEOC v. Hearst Corp., 103 F.3d 462 (5th Cir. 1997)(stating "the statute is

clear that in the first 180 days after the charge is filed, only the EEOC is permitted to sue").

The court is persuaded that a complainant may not file suit until the expiration of the 180-day investigation and conciliation period. See, e.g., Pearce, 912 F. Supp. at 154-57 (explaining policy reasons which support strict enforcement of 180- day period); Spencer v. Banco Real, S.A., 87 F.R.D. 739 (S.D.N.Y. 1980)(detailing statutory support, policy considerations and legislative history affirming Congressional intent that right to sue arises at expiration of 180-day period). In the present case, the EEOC issued Mr. Robinson's Notice of Right-to-Sue 129 days after he filed a charge of discrimination with the EEOC. Consequently, the notice was premature. 42 U.S.C. § 2000e-5(f)(1). Further, other than Mr. Robinson's request, no explanation was offered for the closing of Mr. Robinson's case.[2]

The EEOC's precipitate action triggered the filing of this case before the remedies provided by the statute were exhausted. This emasculates Congressional intent by short circuiting the twin objectives of investigation and conciliation. See 42 U.S.C. § 2000e-5b. Because the issuance of the notice of right to sue was premature, Count I will be dismissed without prejudice to Mr. Robinson's right to refile his complaint with the EEOC and

[2] The EEOC terminated the processing of Mr. Robinson's charge by stating, "it is unlikely that the EEOC will be able to complete its administrative processing within 180 days from the filing of the charge." Aerotek's Mem. in Support of Its Mot. to Dismiss, at Exh. B. No other explanation was offered.

thereafter with this court, if necessary, following completion of the administrative process.[3]

B. Count II: PHRA

Next, Mr. Robinson requests reconsideration of the court's January 21, 1998 order dismissing his race discrimination claim under the PHRA. The request is based on the January 15, 1998 PHRC letter which Mr. Robinson did not receive until February 11, 1998. Pl's Mot. For Relief Pursuant to Rule 60, at 3. Mr. Robinson claims this "newly discovered evidence" constitutes exhaustion of his administrative remedies and renders moot the court's order of January 21, 1998. Defendants, however, claim Mr. Robinson failed to exhaust his administrative remedies under the PHRA because he commenced the federal action before he filed his charge of discrimination with the PHRC.

1. Standard of Review: Rule 60

According to Rule 60, the court may "relieve a party . . . from a final judgment, order, or proceeding for (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); or . . . (6) any other reason justifying relief from the operation of judgment." Fed. R. Civ. P. 60(b). The standard for a Rule 60(b)(2) motion is analogous to Rule 59. 11 Charles Wright, Arthur Miller and Mary Kay Kane, Federal Practice and Procedure: Civil 2d § 2808, 86 (2d

[3] Plaintiff's alternative argument, that the passing of 252 days renders this issue moot, is without merit.

ed. 1995). "That standard requires that the new evidence: (1) be material and not merely cumulative, (2) could not have been discovered before trial through the exercise of reasonable diligence and (3) would probably have changed the outcome of the trial." Compass Technology, Inc., v. Tseng Laboratories, Inc., 71 F.3d 1125, 1130 (3d Cir. 1995). Further, the party requesting such relief "bears a heavy burden" which requires "more than a showing of the potential significance of the new evidence." Id. (citing Plisco v. Union R. Co., 379 F.2d 15, 16 (3d Cir.), cert. denied, 389 U.S. 1014 (1967)). Thus, Rule 60(b) motions "should be granted only where extraordinary justifying circumstances are present." Bohus v. Beloff, 950 F.2d 919, 930 (3d Cir. 1991).

2. PHRA

Under the PHRA, a person must file a complaint of discrimination with the PHRC within 180 days after the alleged discriminatory action occurs. Parsons v. City of Philadelphia Coordinating Office of Drug and Alcohol Abuse Programs, 833 F. Supp. 1108, 1112 (E.D. Pa. 1993). If the PHRC dismisses the complaint or has not entered into a conciliatory agreement, a complainant then has the right to resort to judicial remedies if filed within one year of the complaint. Id.[4] Failure to exhaust

[4] The PHRA provides, in pertinent part:
(c)(1) In cases involving a claim of discrimination, if a complainant invokes the procedures set forth in this act, that individual's right of action in the courts of the Commonwealth shall not be foreclosed. If within one (1) year after the filing of a complaint with the Commission, the Commission

one's remedies under the PHRA precludes a court from exercising jurisdiction over a party's claim under the PHRA. Id.

Here, the parties dispute when Mr. Robinson filed with the PHRC. What is clear, however, is that Mr. Robinson failed to utilize the procedures set forth by the PHRC to resolve this dispute. While the EEOC and the PHRC both investigate and attempt to conciliate employment discrimination complaints, federal administrative proceedings do not satisfy the PHRA's administrative requirements. See Lukus v. Westinghouse Elec. Corp., 419 A.2d 431, 455 (Pa. Super. Ct. 1980).

Accepting Mr. Robinson's factual account as true, his EEOC request to cross-file with the PHRC does not satisfy the PHRC's exhaustion requirements. As stated in this court's January 21, 1998 order, having invoked the PHRA, Mr. Robinson's remedy was limited to "an action in the Court of Common Pleas" pursuant to 43 Pa. Cons. Stat. Ann. § 962(c)(1). Mr. Robinson did not file such an action. Moreover, if the court accepts Defendants' version of the facts, Mr. Robinson filed his complaint nine (9) days after filing in federal court. Invocation of the PHRA requires the complainant to allow the PHRC to attempt to resolve the dispute

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> dismisses the complaint or has not entered into a conciliation agreement to which the complainant is a party, the Commission must notify the complainant. On receipt of such a notice the complainant shall be able to bring an action in the courts of common pleas of the Commonwealth based on the right to freedom from association granted by this act . . . .

43 Pa. Cons. Stat. Ann. § 962(c)(1).

prior to seeking judicial relief. Walker v. IMS America, Ltd., No. 94-4084, 1994 WL 719611, at *5 (E.D. Pa. Dec. 22, 1994), aff'd, 70 F.3d 1258 (3d Cir. 1995)("Under the PHRA, a plaintiff must exhaust her administrative remedies within the PHRC for one year before she may file a court action, unless the PHRC has earlier dismissed the complaint or entered into a conciliation agreement with the plaintiff."); Lyons v. Springfield Corp., No. 92-6133, 1993 WL 69515, at *3 (E.D. Pa. March 10, 1993)(stating "invocation of the procedures set forth in the [PHRA] entails more than the filing of a complaint; it includes the good faith use of procedures provided for disposition of the complaint.").

Finally, Mr. Robinson has not carried his burden of demonstrating any extraordinary circumstances which justify vacating the court's January 21, 1998 order. Foremost, the PHRC letter does not constitute "newly discovered evidence" under Rule 60(b). The letter administratively closing the file was dated January 15, 1998, six days before this court's order but, in any event, it does not change this court's January 21, 1998 order since Mr. Robinson improperly filed his claim in federal court rather than in the court of common pleas as required by the PHRA. Therefore, the court's order of January 20, 1998 will be affirmed and Plaintiff's Motion for Relief Pursuant to Rule 60(b) will be denied.

III. Count IV: Promissory Estoppel

1. Standard of Review: Rule 12(b)(6)

Aerotek also requests dismissal of Count IV of Mr. Robinson's

complaint pursuant to Rule 12(b)(6). Under Rule 12(b)(6), the court accepts all facts pleaded as true and draws all reasonable inferences in favor of the plaintiff in determining whether the plaintiff has stated a claim upon which relief may be granted. Warth v. Seldin, 422 U.S. 490, 501 (1975). If, after accepting as true all of the facts alleged in the complaint, and drawing all reasonable inferences in the plaintiff's favor, no relief could be granted under any set of facts consistent with the allegations of the complaint, the claim should be dismissed. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957); ALA, Inc. v. CCAIR, Inc., 29 F.3d 855, 859 (3d Cir. 1994).

2. Promissory Estoppel in Pennsylvania

In paragraph eleven of his complaint, Mr. Robinson contends that he signed an employment agreement with the Defendants on or about April 30, 1997. Compl. ¶ 11. To the contrary, Aerotek claims that Mr. Robinson did not sign an employment agreement and, therefore, he was an at-will employee subject to termination with or without cause. Df. Aerotek’s Mem. in Support of Its Mot. to Dismiss, at 11.

The first issue for consideration is whether Mr. Robinson has pled sufficient facts to overcome the presumption under Pennsylvania law that he was an employee at-will. See Luteran v. Loral Fairchild Corp., 688 A.2d 211, 214 (Pa. Super. Ct. 1987). To do so, a plaintiff must show: (1) an agreement for a definite duration; (2) a provision limiting discharge to just cause; (3) sufficient additional consideration; or (4) an applicable

recognized public policy exception. Id. Mr. Robinson has not presented anything but a conclusory allegation to the court regarding his employment status. Therefore, he has not overcome the presumption of being an employee at-will.

Moreover, case law does not recognize promissory estoppel as an exception to employment at-will in Pennsylvania. In Paul v. Lankenau Hospital, the Supreme Court of Pennsylvania stated that "our law does not prohibit firing an employee for relying on an employer's promise." 569 A.2d 346, 348 (Pa. 1990)("Absent a statutory or contractual provision to the contrary, the law has taken for granted the power of either party to terminate an employment relationship for any or no reason."); see also Brethwaite v. Cinncinati Milacron Marketing Co., No. 94-3621, 1995 WL 232519, at *5 (E.D. Pa. April 19, 1995) (stating at-will employee has no claim for promissory or equitable estoppel because of his or her alleged reliance on employer's promise).

Consequently, Aerotek's Motion to Dismiss Count IV will be granted insofar as Mr. Robinson is claiming that promissory estoppel is an exception to employment at-will in Pennsylvania.

III. CONCLUSION

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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:

NATHANIEL ROBINSON,	:	
Plaintiff,	:	CIVIL ACTION
	:	NO. 97-CV-6497
v.	:	
	:	
RED ROSE COMMUNICATIONS, INC.,	:	
DENVER EPHRATA TELEPHONE and	:	
TELEGRAPH COMPANY and	:	
AEROTEK, INC.,	:	
Defendants.	:	
	:	

O R D E R

AND NOW, this day of MAY, 1998, it is hereby

O R D E R E D

that:

(1) Plaintiff's Motion for Relief Pursuant to Rule 60(b) is **DENIED**;

(2) Defendant Aerotek's Motion to Dismiss Counts I, II and IV is **GRANTED**.

BY THE COURT:

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JOSEPH L. McGLYNN, J.